

No. 1322.

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

WILLIAM PARDY, and A. HASSLER,	}	Appellants,
vs.		
J. D. HOOKER COMPANY, a corporation,	}	Appellee.

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Appellants' Opening Brief.

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APPELLANTS' OPENING BRIEF.

This action was brought in the U. S. Circuit Court for the Southern District of California by the Appellants against the Appellee, to obtain an injunction against the use by the defendant of a machine which is an infringement of U. S. Letters Patent, No. 434,677, dated Aug. 19, 1890, for a Pipe Riveting Machine, and for an accounting. This patent was issued to William Pardy as executor of the last will of George Pardy, deceased.

The answer sets up the defense that George Pardy was not the inventor of the pipe riveting machine set forth in said Letters Patent, but that J. D. Hooker was the inventor of said machine, and that William Pardy acting as the executor of George Pardy, sought surreptitiously to appropriate the invention described in the Letters Patent, and falsely alleged that George Pardy was the inventor of said machine when he made the application for Letters Patent, and thereafter surreptitiously and unjustly obtained the patent sued on for that which was in fact invented by J. D. Hooker.

In the year 1887 J. D. Hooker, the President of the defendant corporation, was engaged in the business of manufacturing riveted steel pipe at Los Angeles, California, and George Pardy was a mechanical engineer and solicitor of Patents at San Francisco, California.

At that time there were no machines for riveting steel pipe when the rivets used were set cold. Hooker was having trouble with his men, and desired to have a machine which would rivet pipe. He consulted and employed George Pardy to build a machine for him at San Francisco, Hooker paying the bills for the construction of the machine. George Pardy designed the machine and superintended its construction and installation at Hooker's pipe works at Los Angeles. The first pipe riveting machine was set up at Hooker's works in Los Angeles in the early part of the year 1888. George Pardy came down from San Francisco and installed the machine, and worked over it until it worked all right.

A second machine was constructed at San Francisco by George Pardy in the early part of 1888, and was also installed in Hooker's pipe works the same year. George Pardy died in August, 1889, leaving a last will, which was duly probated at San Francisco. William Pardy as executor of that will, filed an application for Letters Patent on December 16, 1889, and the Letters Patent sued on were issued on that application on August 19, 1890. After the letters patent were issued, J. D. Hooker employed the Fulton Engine Works at Los Angeles, California, in the year 1893 to build a third machine like the first two machines, except that it was for making larger size pipe. Subsequently, J. D. Hooker transferred his steel pipe works, together with these pipe riveting machines, to the defendant corporation and at the time this suit was brought the defendant corporation was using all three of those machines in its business. The defendant was incorporated Feb. 13, 1895. The complainants, through probate proceedings in the estate of George Pardy and by mesne conveyances have succeeded to the title of the Letters Patent sued on. It is to enjoin the further use of the third and last machine and for an accounting of the profits made by its use that this suit is brought. The only question involved in this action is, was George Pardy or was J. D. Hooker the inventor of the machine described in the letters patent sued on in this action.

The ordinary rule of law which concedes to the prevailing party obtaining a verdict in the Court below the

presumption that he is right on all disputed points or facts, and the Appellate Court will not inquire into these is not the rule when an attempt is made to impeach the validity of a patent. It cannot be done by a conflict of testimony. The verdict in the Court below may be binding on all other points in which there is a substantial conflict in the testimony, but this rule will not obtain when an attempt is made to impeach a patent. It can only be done on such a preponderance of testimony as establishes beyond a doubt that the patent was surreptitiously obtained. On this point we desire to call the attention of the Court to the rule of law established hereon.

In the Barbed Wire Fence-cases, the Court says:

“We have now to deal with certain unpatented devices, claimed to be complete anticipations of this patent, the existence and use of which are proven only by oral testimony. In view of the unsatisfactory character of such testimony, arising from the forgetfulness of witnesses, their liability to mistakes, their proneness to recollect things as the party calling them would have them recollect them, aside from the temptation to actual perjury, courts have not only imposed upon defendants the burden of proving such devices, but have required that the proof shall be clear, satisfactory, and beyond a reasonable doubt. Witnesses whose memories are prodded by the eagerness of interested parties to elicit testimony favorable to themselves are not usually to be depended upon for accurate information. The very fact, which courts as well as the public have not failed to recognize, that almost every important patent, from the Cotton Gin of Whitney to the one under consideration, has

been attacked by the testimony of witnesses who imagined they had made similar discoveries long before the patentee had claimed to have invented his device, has tended to throw a certain amount of discredit upon all that class of evidence, and to demand that it shall be subjected to the closest scrutiny. Indeed, the frequency with which testimony is tortured, or fabricated outright, to build up the defense of a prior use of the thing patented, goes far to justify the popular impression that the inventor may be treated as the lawful prey of the infringer."

Barbed Wire Patents, 143 U. S. 275; Book 36,
L. C. P. 158.

In *Deering v. Winona Harvester* case, the Court says:

"As we have had occasion to observe, oral testimony, unsupported by patents or exhibits, tending to show prior use of a device regularly patented is, in the nature of the case, open to a grave suspicion. *Washburn & M. Mfg. Co. v. Beat 'Em All Barbed Wire Co.* ('The Barbed Wire Patent' 301), 143 U. S. 275 (36; 154). Granting the witnesses to be of the highest character, and never so conscientious in their desire to tell only the truth, the possibility of their being mistaken as to the exact device used, which, though bearing a general resemblance to the one patented, may differ from it in the very particular which makes it patentable, are such as to render oral testimony peculiarly untrustworthy; particularly so if the testimony be taken after the lapse of years from the time the alleged anticipating device was used. If there be added to this a personal bias, or an incentive to color the testimony in the interest of the party calling the witness, to say nothing of downright perjury, its value is, of course, still more impaired.

This case is an apt illustration of the wisdom of the rule requiring such anticipations to be proven by evidence so cogent as to leave no reasonable doubt in the mind of the court, that the transaction occurred substantially as stated.”

Deering v. Winona Harvester Works, 155 U. S. 300; 39 L. C. P. 159.

It was incumbent upon the defendant to establish the defense that J. D. Hooker was the inventor of the machine described in the Letters Patent. In the celebrated Bell Telephone case, the Court says:

“The complainant starts with the benefit of the presumption of law that Bell, the patentee, was the inventor of that for which the Letters Patent were granted him. Whoever alleges the contrary must assume the burden of proof. Evidence of doubtful probative force will not overthrow the presumption of novelty and originality arising from the grant of letters patent for an invention. It has been frequently held that the defense of want of novelty or originality must be made out by proofs so clear and satisfactory as to remove all reasonable doubt. *Washburn v. Gould*, 3 Story, 227; *Smith v. Fay*, 6 Fish., 446; *Hawes v. Antisdel*, 2 B. & A., 10; *Patterson v. Duffy*, 20 Fed. Rep., 641; *Wood v. Cleveland Rolling Mill Co.*, 4 Fish 560; *Parham v. American Button Hole Co.*, do., 482.”

In the *United States Stamping Co. v. Jarrett* (Blatch, 469) Blatchford, J., said the defendant had not fulfilled “the necessary obligation of showing beyond any reasonable doubt” that Weber (the alleged prior inventor) was prior to Heath (the patentee).

In *Coffin v. Ogden* (18 Wall, 129), Mr. Justice Swayne, delivering the opinion of the court, stated the rule applicable to the defendant as follows:

“The burden of proof rests upon him, and every reasonable doubt should be resolved against him.”

American Bell Telephone Co. v. The Peoples Tel. Co. et al., 22 Fed. Rep., p. 309-13.

In *Coffin v. Ogden*, *supra*, the Court went further than stated in the above citation, and stated as follows:

“The invention or discovery relied upon as a defense, must have been complete, and capable of producing the result sought to be accomplished; and this must be shown by the defendant. The burden of proof rests upon him, and every reasonable doubt should be resolved against him. If the thing were embryotic or inchoate; if it rested in speculation or experiment; if the process pursued for its development had failed to reach the point of consummation, it cannot avail to defeat a patent founded upon a discovery or invention which was completed; while in the other case there was only progress, however near that progress may have approximated to the end in view. The law requires, not conjecture, but certainty. If the question relate to a machine, as thus exhibited, the conception must have been clothed in substantial forms, which demonstrate at once its practical efficacy and utility. *Reed v. Cutter*, 1 Story, 200.”

Coffin v. Ogden, 18 Wall, 129; 21 L. C. P. 821.

The rule of law both on the burden of proof and as to what constitutes invention, is very clearly set forth

in *Lalanc & Grosjean Mfg. Co. v. Haberman Mfg. Co.*,
53 Fed. Rep. 375, as follows:

“He who first produces a device is entitled to be considered the inventor thereof, unless it be shown that another person was first to conceive of the invention, and was using due diligence in completing it, or suggested to the one who first produced the device all its parts, so that in producing it he was simply carrying out the suggestions of another. On this subject Mr. Justice Clifford said:

“The settled rule of law is that whoever first perfects a machine is entitled to the patent, and is the real inventor, although others may have previously had the idea and made some experiments toward putting it in practice. He is the inventor and entitled to the patent who first brought the machine to perfection and made it capable of useful operation. *Agawan Co. v. Jordan*, 7 Wall., 583.

“Mere suggestions, even if they pointed toward a result are not sufficient to entitle one making them to be considered the inventor. In order that he may claim the benefit of what another does his suggestions must leave nothing for the mechanic to do but to work out what has been suggested. On this point Judge Nelson, in instructing the jury in the case of *Pitts v. Hall* (2 Blatch., 229), said:

“Now, there is no doubt that a person, to be entitled to the character of an invention within the meaning of the act of Congress, must himself have conceived the idea embodied in his improvement. It must be the product of his own mind and genius, and not of another’s.

“Is the patent anticipated by the Vollrath process?

“In considering this question, it is well to keep in mind the rule upon this subject. He who alleges

prior use must establish it by the same high class of testimony which a prosecuting attorney is required to produce in a criminal case. He holds the affirmative of that issue, and must prove it beyond a reasonable doubt. If the evidence is susceptible of two interpretations, the one sustaining and the other destroying the patent, the court must accept the former."

The question of priority of invention is one that is frequently arising in the United States Patent Office, and is perhaps the most fruitful source of controversies arising in that office. We quote from the decision of *Stevens v. Putnam*, reported in the 18th Official Gazette, page 520, and at page 164 of the Commissioner's Decisions for the year 1880, in which the Hon. Marble, Commissioner, says:

"The earliest date at which an invention can be said to exist is that time when there was in the mind of the inventor a well-defined idea of something which might rightfully constitute the subject of a patent. The law is well settled that a mere unembodied principle or discovery is not a subject of a patent, and it must logically follow that the mere mental apprehension of the same is not the conception of an invention. When, however, the principle or discovery is rendered of practical service by its embodiment in material form, there exists something for which a patent can be allowed, and the union in mind of the inventor of this principle or discovery with the means of its embodiment is conception of the invention. The fact of the conception of an invention is one which public policy demands shall have been so evidenced as to be capable of other proof than the mere allegation of the

inventor that such invention was at a certain time in his mind before it can avail him anything, and as long, therefore, as he keeps his invention unembodied and undisclosed it cannot serve to antedate and thus defeat the invention of a contestant. *Berring v. Haworth*, 14 O. G. 117; *Farmer v. Brush*, 17 O. G., 150; *Kinsman v. Dickson*, M. S., Dec., Vol. 21, p. 323. In the last cited case I stated that—"The reason of this rule is obvious, since the mere conception, while it remains in the mind of the inventor, must perish with him and can add nothing to the world's store of knowledge, and it is, moreover, a matter utterly incapable of rebuttal, and were a party permitted by such a mere allegation of conception to establish priority of invention a premium to false swearing would be offered against which honest inventors could have but little security.'"

Doolittle, acting Commissioner of Patents, says:

"An incomplete conception of a device, or merely conceiving that a simple thing might be done, and showing but partly how it may be done, does not constitute invention as defined either by the courts or the office."

Gordon v. Withington, 9 Official Gazette, 1009; C. D. 1876, p. 111.

In the interference case of *Voelker v. Gray v. Edison v. Bell et al.* Hon. B. Butterworth, Commissioner, in deciding that case in which great interests were involved, the Telephone patent, says:

"As a guide to truth it is safer to rely upon the actions of men than upon their expressed declarations, where the actions and declarations are incon-

sistent. Individuals, as a rule, act and speak in harmony with their own interests, certainly if consistent with truth. All persons reason in the direction of their desires, and resolve doubts in their own favor. When the dim and distant recollection of a party concerning his own or the conduct of another, in a matter of great interest to him who speaks, is found to be wholly at variance with what the known facts in that connection would naturally suggest and prompt, the fair inference is that the recollection of the witness is at fault, and that the logic of the known facts points nearer to the truth. It is natural for persons to hunt hastily through the pigeon-holes of memory where unpleasant or damaging truths are supposed to be stored away; and, on the other hand, it is just as natural to encourage and quicken the pace of a lagging and uncertain recollection which is believed to contain even a fragmentary fact which will tend to mend a flaw in a title through which valuable interests may escape. When an applicant seeks to overthrow a patent granted to one who, though junior in date of conception, has yet shown diligence in filing his application and reducing his invention to practice, the former must in view of the importance, not merely to the patentee but to the general public, show entire freedom from laches. Nothing could sooner bring the patent system into disfavor than to permit a patent granted for a valuable invention in which thousands have become interested to be overthrown by a competitor in the same field of invention on evidence which fails fully to establish the superior claims of the junior applicant to be adjudged the prior inventor. And it is in view of this fact, that doubts are resolved in favor of the patentee. See *Cushman v. Parham*, C. D., 1876, 130; *Wheeler v. Chenoweth*, C. D., 1869, 43; *McKnight v. Van Wagemen*, C. D., 1876, 127; *Rich-*

ardson v. Denza, C. D., 1870, 156; Morse v. Clark, C. D., 1872, 58; Gray v. Hall, C. D., 1871, 129; Busha v. Phelps, C. D., 1876, 119; Wheeler v. Clipper Mower and Reaper Co., 6 Fisher 1.; Stoner v. Clark, C. D., 1877, 92; Towers v. Pease, C. D., 1878, 6; Sargent v. Burge, C. D., 1877, 62; And also the following court decisions: Ellithorpe v. Robertson (2 Fisher, 83); Union Sugar Refinery v. Matthesen, (2 Fisher, 62). * * * It is not enough that an applicant ranging through the field of experiment unconsciously stumbles upon that which is nearly related and very similiar to the device in controversy. The conception must not be of the result to be attained, but the means (which is the patentable thing) to produce that result. As long as there was a missing ingredient, in the absence of which the means utilized was a failure and the desired result unattainable, the invention was incomplete. The question is, what was in fact, accomplished, not what could have been had the inventor possessed the light which he subsequently obtained, either by research or from a more successful competitor. There is not unfrequently a disposition on the part of an applicant to confound a strong desire in the mind to produce certain results by some means of which he has but a vague and indefinite conception with an intelligent conception of a machine adapted to accomplish those results. It is in such cases that the desire, coupled with the imperfect conception of a device, ripens and matures in the light of subsequent knowledge. That of which the law takes notice is not the maturing, but the matured conception, which can materialize in an operative device; but it very frequently occurs that the inventor confounds his original desire and later conception and gives the latter the date of the former, and does it innocently. In such cases we appeal to the inherent probabilities, which are always the ear-marks of truth. One

is found in the conduct of men—for instance, where a person has been searching long and earnestly for a valuable thing which he is anxious to utilize, and can only utilize when found by introducing it to the public.”

Applying these principles to the case before the court, which reverses the rule of law that the verdict of the court below establishes the contention of the party in whose favor the verdict was rendered, the defense that George Pardy was not the inventor of the machine described in the Letters Patent and that J. D. Hooker was the inventor of such machine is not only not sustained by the evidence beyond any reasonable doubt but it is not sustained by the evidence at all. The only testimony introduced by defendant to sustain that defense is the testimony of J. D. Hooker alone and uncorroborated in a single particular, who testifies after 17 years that it was he who made the sketches for George Pardy (page 124 trans.)

William Pardy testified that in September, 1889, he had a conversation with J. D. Hooker about this pipe riveting machine and that in that interview he stated “that there were two ways of settlement with the estate; either to pay a fair and proper compensation, to-wit, for the riveting machine spoken of or to allow the estate to take out a patent upon it.” And that Mr. Hooker replied, “you can take out the patent.” (See pages 25-6 trans. In that connection he explains that as executor of the estate he had possession of letters written by J. D. Hooker to George Pardy, in which the question as

to who should own the patent was discussed and that was why he had this conversation with Mr. Hooker, "And wishing to determine the matter I made the proposition that he should control it for a fair moneyed compensation, or the estate should be allowed to take out the patent upon the machine without his opposition." (See page 27.)

A. Hassler testified that she was present at the time of this conversation and her version of the conversation was as follows: "Mr. Pardy said to Mr. Hooker that there were two ways of settling this; one was for Mr. Hooker to pay to the estate of Geo. Pardy a certain amount for his labor, invention, etc., and the other was, that we would take out a patent; and Mr. Hooker replied, 'get the patent.'" (See page 32-3). Mr. Hooker swears positively that no such conversation ever took place. Hooker admits going to see William Pardy after the death of George Pardy, but alleges that his only object was to inquire where Geo. Pardy was buried. Is it reasonable to believe that Hooker told the truth, and that William Pardy and Miss Hassler both perjured themselves? We say, No.

The patent is *prima facie* evidence of everything necessary to its issue. The introduction of the patent in evidence is all the proof that is necessary to establish *prima facie* that Geo. Pardy was the inventor of the machine described therein. In addition to that presumption we have the testimony of William Pardy and Miss Hassler that Hooker said for William Pardy as executor, to take out the patent.

Under the principles set forth in the foregoing decisions, taking the testimony of Hooker in its most favorable light he was not the inventor of the machine. According to his testimony the machine that George Pardy built according to his direction and sketches, was an unsuccessful machine. As was said in *Coffin vs. Ogden, supra*:

“If the question relating to a machine, as thus exhibited the conception must have been clothed in substantial form which demonstrated at once its practical efficacy and utility.”

At page 126 trans., Hooker says:

“I explained to them the result that I wanted to accomplish and laid out that line of old principles, and I wanted them brought into line and work as we had outlined it. Further than that I could not give any instructions.”

Commencing at page 97 Trans., is the testimony of Mr. Hooker as to the various steps and suggestions which he made to Geo. Pardy in relation to having a pipe riveting machine made for him. As the result of his suggestions according to his testimony, Geo. Pardy went back to San Francisco and selected a firm by the name of Rix and Kittridge to take up and manufacture this machine under his supervision, Hooker paying the bills and guaranteeing the account. It took three months to do the work (page 123). Hooker says “they were to take their instructions from Mr. Pardy.” That machine was made and brought down and put in place. Mr. Pardy came down with it, because he wanted to see it work. But it was unsuccessful. (page 102 trans.)

Hooker then details how he and his workmen changed and completed the machine so that it worked satisfactorily. In making those changes he says, "Pardy is not in it, he is not any where in it, he is a thousand miles away." (page 109 trans). At the same time, however, the testimony shows that Pardy was at work upon a second machine.

In opposition to Hooker's testimony which is not supported by a single scratch of the pen or by the testimony of any other witness whatever, or any circumstance to corroborate Hooker, we have the testimony of S. H. Gowen that all changes made in the first machine to make it work satisfactorily were made by Geo. Pardy who put the machine up in Mr. Hooker's works. Mr. Gowen worked for Hooker and the defendant company from 1887 until 1903, (page 133). At page 134 Gowen says "there was no material change made in the principles of the first machine, that at first it did not work satisfactorily for awhile but that George Pardy with his assistance made the machine work satisfactorily." Now here is a direct conflict between the testimony of Gowen and Hooker on a material point. Gowen is not interested in the result of the suit. Hooker is the President of the defendant corporation and must necessarily be affected by the result of the suit. Whose testimony is to be believed, the interested or disinterested witness? In opposition to Hooker's testimony, and to establish the reverse of his contention, that he was the inventor of the machine we have Hooker's letters written by him to George Pardy during the time the machine was being

manufactured in which Hooker speaks of the machine as follows:

Letter of Oct. 10, 1887, (page 174):

“Dear Pardy: Your letter, 8th received—glad to hear you are sure you can make the machine. Go ahead with all possible dispatch don’t lose any time. I want the trial made of this machine with dispatch and am ready to pay the bill whether or not the venture will work. *If you should fail in this, maybe in another you would not.*”

Letter of Oct. 26, 1887, (page 177-8):

“*Hope your efforts will be as successful as you hope.* Robbins says he goes East to see one of the best men in the known world in regard to making riveting. Told him did not want him to take up our ideas—say Well, patent it then.”

Letter of Oct. 29, 1887, (page 178):

“I have a new building ready for *your machine* with shafting, etc.; ready to go in place as soon as you will require it.”

Letter, Nov. 25th, 1887, (page 179):

“Dear Pardy: Here you have her. \$200 as you request, Rah! Rah! Rah! for the machine of she works.”

Letter of Dec. 23, 1887, (pages 179-80):

“The delay and expense O. K. if the machine will prove a success. *It has always seemed to me that the motion to crush the rivets should be like the movement of the die machine at the mint. You know how nicely*

that has to work but you doubtless have investigated that movement."

Letter of Jan. 5, 1888, (page 181):

"Put all the finishing touches upon the Riveter, make its appearance fine, taking that is something to the workmen you know. Do everything you think should be done and then send her forward but in doing this don't delay too long, I cannot possible go up, am to busy, will send you all the pipe you want.—The expense cuts no figure on the first machine—plan a little for a single riveter with holes 7-8 from centers—I, think we must have near two of this size to set a 5 lb. rivet in 4-5 and 6in. pipe light iron, say No. 18 and 16. I am determined to give these machines a good trial. Build a second one as soon as you feel yourself justified in doing so."

(How does this comport with his testimony that he is the inventor)?

Jan. 17, 1888, (page 182):

"Better push another riveter ahead at once with a rush—I want it P. D. Q. The one you shipped has not arrived. No advices of it. Will not keep you any longer than necessary. Are you to send Pete to run it, and set it up? If you have Robbins build these, tie him up in some way that he will not build for any one else. The Lacey crowd will be after him at once."

This from the man who claims he invented the machine.

Feb. 1st, 1888, (page 182):

"I find my new engine will run the main shaft 140 rev.

will this affect *your Riveter* so as to impare its use, if so will have to put in a counter shaft. Please advise by wire."

Why not *my riveter*, if he was the inventor?

Letter, Feby. 17, 1888, (page 183 trans.):

"I have yours of the 9th. Well maybe I get shook up once in awhile. There is going to be lots of work in the future but these hounds go in and kick all the profit there is in a job out of it. However, I think they will tire of it by and by. I don't propose any one shall have those machines if I can help it. * * * Again, as to the machines *I understand I am to own and control the patent upon them paying you a fair and reasonable sum and for all your time and labor and what will be just and fair between us.*"

In letter of March 16, 1888, (page 184): Hooker specifies different parts of the machine which are O. K. going over the whole machine, in reply to inquires from Pardy. In his specification he says, "Gear wheel much easier and smoother since you loosened her. 8-steel pc. on mandrel is as you left it. 9-can't say where *you can improve* except holding down bar at end where George props it with stick of wood. 12—What progress have you made with new machine?"

March 19, 1888, (page 184):

"My men are all on the rampage down here, everything is off but the riveter. George is running her at the rate of 25 joints per hour per day. The work is O. K. How long before you can have a machine to

rivet no. 12 and 14 iron? Will have a lot to make right away."

March 24, 1888, (page 186):

"All our men are on the rampage except the yard men. It is both on account of wages and machine. I am running machine on 6 in. pipe. Sam tried his best to make a bad job of it, find fault with it and is an internal enemy. The machine does well and when we get one or rather two or three more going it will make a bulwark they cannot overthrow."

April 30, 1888, (page 189):

"There are no new defects that I know of, the machine is doing the best work it ever did."

Letter, July 20, 1888, (page 190):

"Send machine, don't keep it for me, I may not go to S. F. but to Tahoe direct—besides I have a machinist here ready to put it in place.

"There are some large jobs to be let along these Sieras. *I don't want to sell these machines, can make more out of the work, I want to own the whole business, paying you fairly and square, what would be right, besides if we get these contracts there will be a chance for you to make more money this way than in Mfrg. machines. Could I control the coating and machines, it would be worth thousands every year.*—Montague is trying to get a machine for the Lacey outfit here. It would not be very nice to have my enemy at once, have all the things. —I have studied and brought up—it is bad enough to have them cut me out with this coating, *to give them the*

machine would RUIN OUR BUSINESS ENTIRELY. I would quit before I would follow it. They bid to cost for work hoping to bust me out and agree to do all I will do—by putting in testing pipe. I got the Riverside work at 10 per cent. above their bid—their object is ruin, am in doubt whether or not it would not be money in my pocket to move away at once.”

These letters show the great anxiety which Mr. Hooker had at the time to control the machines and the patent on them. The statements in these letters are utterly inconsistent with the idea that Mr. Hooker was the inventor of the machine. In Hooker’s examination, and before he was aware that complainants held these letters he was examined by counsel in relation to getting out a patent on this machine. At page 115, he says, “Pardy suggested that he, Hooker, take out the patent and that he, Hooker, wanted to help Pardy, but said there was no use to take out a patent on it because it was not worth patenting.”

And again he makes the puerile excuse as follows: (page 117): “I understand that if any one wanted those machines as a manufacturer and I had none for sale, that he had the right to go and have one made for his own use as against anything I might do. Therefore, having the patent on the machine for me, would be no advantage to me that I could see.”

Hooker says at that time he gave Pardy \$60 and told him he could make his drawings at his convenience. Now, why should Hooker give Pardy \$60 to make drawings if he didn’t want a patent? We don’t believe that

he gave him any money at all, and we don't believe that Hooker thought any one could make a machine for his own use. Hooker had before applied for patents and obtained them through Pardy. One was for a jack for handling red-wood logs, and another was a patent for a coating of his pipe. (See page 97.)

A partially prepared specification in the handwriting of Geo. Pardy himself, in which it was stated in his writing that he was the inventor of this pipe riveting machine was introduced in evidence. (See page 57.)

Mr. E. E. Osborne, a patent solicitor of San Francisco, from this specification and drawings and material furnished by the executor of Geo. Pardy's estate, prepared the drawings and specifications upon which the patent was issued (pages 38-9). A sketch (page 66 A-B) embodying the essential features of the machine shown in the letters patent was introduced in evidence, and William S. Pardy, a son of one of the complainants identified it as a sketch made by Geo. Pardy deceased, in the latter part of the year 1887, and that it was made after a conversation between George Pardy and Mr. Hooker. He states that Mr. Hooker told his uncle Geo. Pardy that he, Hooker, would like to get a riveting machine that would rivet pipe, and that if he could get up such a machine he could make some money out of it. That at the time no suggestions were made by Mr. Hooker to Geo. Pardy, in relation to the construction of such riveting machine. (See pages 40-1.)

The court below decided the case on the unsupported

and uncorroborated testimony of J. D. Hooker that he was the inventor of the machine, notwithstanding it was incumbent upon the defendant to establish beyond all reasonable doubt that Hooker was the inventor of the machine. Does his testimony viewed in the light of ordinary business experience, and in the light of the letters written by him at the time warrant this decision? We say, No. In the first place his letters show that a successful pipe riveting machine was very necessary in his business and that he was extremely anxious to obtain one. They also show a great anxiety to prevent his business rivals from obtaining one of these machines. They also show that he was very anxious to control the patents on the machine. The testimony shows that the machine was a successful machine. The testimony shows that Geo. Pardy made a sketch, which embodies the essential features of the machine, immediately after a conversation held with Mr. Hooker, in which Hooker stated that he wanted a pipe riveting machine, but did not detail its construction. Hooker's letters will bear no other construction than that the machine which Geo. Pardy was then building was not the product of any plan prepared by Hooker. His letter of Dec. 23, 1887, page 179, clearly states that the machine which Geo. Pardy had built was not built on any plan suggested by Hooker as he says "*It has always seemed to me that the motion to crush the rivets should be like the movement of the machine at the mint.*" Why should he make such statements if the machine was built accord-

ing to sketches prepared by himself? We have the testimony of both complainants that Mr. Hooker stated that William Pardy as executor should take out the patent on this machine. We have the fact that notwithstanding the anxiety shown by Mr. Hooker in his letters to own the patent on the machine and the further fact that he testified he paid Geo. Pardy \$60 for preparing the drawings, Hooker did nothing toward obtaining a patent on the machine which was a "*bulwark to his business*," (letter, page 186). These facts are entitled to a great deal more weight than Mr. Hooker's interested statement that he was the inventor of the machine.

Another peculiar circumstance in connection with Hooker's testimony is that Hooker testifies that these conversations which he had with Geo. Pardy, and these alleged sketches which he gave to Geo. Pardy relating to this riveting machine, which his letters show he was so anxious to have, occurred in the arly part of 1837, January, February or March, (page 123), while the letters show that Geo. Pardy did not begin upon the work of constructing the machine until October, 1887.

Another statement of Mr. Hooker's is also very peculiar. Mr. Hooker testified that his agreement with Mr. Pardy in relation to building this machine was that he would "simply pay him his charges for the time he was employed," (page 123). And that he had overpaid him for his time but kept no account or receipts of the amounts paid. That he would be in Pardy's office when Pardy would say he was short of money, hadn't got money to pay his room rent with, and then Hooker

would ask him how much would satisfy him and Pardy would say so much and Hooker would give it to him.

At the same time that Hooker stated these requests were made by George Pardy we showed by George Pardy's bank books that at all the time he was building these machines for Hooker he had a balance in the bank, and that on one occasion he loaned Hooker \$100. In Hooker's letter of May 6th, 1889, to Geo. Pardy, (page 191, he writes: "I propose to do the square thing with you and I don't think you ever knew me to do otherwise. I shall be in S. F. shortly when I will see you. You have not paid out any of your money for me. I will make it plain to you."

This last letter shows that at that time Pardy was claiming that he had paid out money for Hooker and was asking the return of it.

On all points Hooker is contradicted by his written admissions made at the time of the transaction and by the testimony of all the witnesses.

Hooker says "he made sketches and gave them to Geo. Pardy and detailed to Pardy the principles of the machine. In none of the letters of Hooker is anything of the kind claimed. On the contrary they show that the plan was Pardy's.

Wm. S. Pardy says that he heard a conversation between George Pardy and Hooker, in which Hooker stated that he wanted a machine for that purpose but gave no instructions as to how it was to be built, and on the same afternoon, after Hooker left his uncle's office, George Pardy made the sketch which was introduced

in evidence and is found at page 66 A-B, which shows the substantial principles of the patented machine.

Hooker says that the first machine was unsuccessful and that he and his workmen principally Stellow, worked with the machine until he made it work successfully.

S. H. Gowen says that George Pardy came down from San Francisco, and that he and Pardy worked on the machine until it was put in good working order. In Hooker's letter of March 16, 1888, he admits that George Pardy had been at work on the machine because he says "*Can't say where you can improve except holding down bar at end where George props it with stick of wood, also gear wheel works much easier and smoother since you loosed her.*"

Either Hooker told the truth or Gowen did. Hooker's letter of March 16, 1888, corroborates Gowen. If Hooker would swear falsely in this matter, why would he not swear falsely in all other matters? Hooker was an interested witness. Gowen was not.

Hooker's statement that he didn't want to get out a patent because it would be of no use to him is flatly contradicted by his letters written at the time. His reasons given when his testimony was taken, for not wanting to take out the patent are so foolish that they bear the stamp of untruth.

That the machine was very valuable in Hooker's business, his letters written at the time show; that he was very anxious to control the patent on the machine, his letters also show.

Which statement is to be believed? Hooker's written statement made against his own interest and at the time the transactions occurred, or his statements made 17 years later that he did not want a patent on the machine because another manufacturer could make one for his own use if he, Hooker, did not have them for sale?

We have the testimony of two witnesses that Hooker stated that the estate was to take out the patent on the machine and against this we have Hooker's uncorroborated statement that he did not so state.

Under the rule above established, the testimony of Hooker should have been corroborated, whereas, there is not an incident or circumstance in his letters or in the testimony of any of the other witnesses which has a tendency to corroborate him. We are unable to find a single incident which has a tendency to do so, whereas, the whole case teems with circumstances which show that his testimony is very unreliable. The letters written by him at the time would have disclosed some circumstance inconsistent with the fact that Pardy was the inventor, if it were not true, but they do not.

Can the Judges of this court believe that the unsupported testimony of Hooker, contradicted as it is in material matters of which there could be no mistake, *furnishes them with evidence sufficient to satisfy them beyond any reasonable doubt*, that Hooker was the inventor of the machine described in the letters patent? If his testimony does not produce that conviction then

the prima facie case made by the introduction of the letters patent was not overcome and the judgment of the court below should be reversed with instructions to find a decree for complainants.

Respectfully submitted,

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HAZARD & HARPHAM.
of Counsel.

Delay does not prejudice
US vs American Bell P.C.
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